



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 444 OF 2009**

**NASHON NJIRA ONDIEK .....PLAINTIFFS**

**RICHARD CEPHAS ONDIEK**

**ALEX OYOMO AADHO (Sued as Chairman, Secretary & Treasurer of  
FELLOWSHIP MASSED CHOIR)**

**VERSUS**

**JOSEPH NGANGA.....DEFENDANTS**

**PETER NJOROGE GITAU**

**PETER CHEGE (Sued as Chairman, Secretary and Treasurer of  
FAITH INTERNATIONAL MINISTRIES)**

**RULING**

The plaintiff's suit filed on 4<sup>th</sup> September 2009 was on 3<sup>rd</sup> February 2012 dismissed at the instance of the court for want of prosecution pursuant to the provisions of order 17 Rule 2 (1) and (4) of the Civil Procedure Rules. The plaintiff by a Notice of Motion dated 26<sup>th</sup> July 2013 seeks orders that the suit dismissed on 3<sup>rd</sup> February 2012 be reinstated and that the costs of the application be in the cause.

The application is premised on the grounds set out on the face of the application and on the annexed affidavit of **GERPHAS OPONDO** sworn in support thereof. As per the supporting affidavit the plaintiffs state that on 13<sup>th</sup> January 2010 they wrote to the Chief Land Registrar seeking the letter of allotment attached to the replying affidavit of the Respondent and were awaiting the Chief Land Registrar's response before fixing the matter for hearing. The plaintiffs further state as they did not get a response from the Chief Land Registrar they as from 7<sup>th</sup> December 2011 sought to have the matter fixed for hearing and as per annexure "GO1" they invited the Defendants Advocates on 13<sup>th</sup> December 2011, 17<sup>th</sup> January 2012 and 7<sup>th</sup> February 2012 to take hearing dates but the court file was on every occasion stated to be unavailable.

In what appears to be a contradiction the plaintiffs under paragraph 11 of the supporting affidavit state:

**“That on the 4<sup>th</sup> February 2012 we prepared and attempted to file a Notice of Motion for reconstruction of the file but we were informed by Mr. Getenke at the Registry that the suit was dismissed on 3<sup>rd</sup> February 2012”.**

As per the letter of invitation to take a hearing date the parties were to meet at the registry on 7<sup>th</sup> February 2012 at 10.00a.m. to fix a hearing date. It is noteworthy that there is no endorsement by the registry on any of the invitation letters that the court file was unavailable such that a date could not be given.

The Defendant/Respondent filed grounds of opposition to the application dated 2<sup>nd</sup> December 2013 and inter alia set out the following grounds of oppositions:-

- 1. That application is misconceived, frivolous and an abuse of the court process.**
- 2. There has been an inordinate delay since the application has been filed 1 year 5 months after the suit had been dismissed.**
- 3. No explanation has been offered for the delay in filing the application.**
- 4. Prior to the suit being dismissed, it had been 1 year and 4 months since the matter was last in court.**

The parties filed written submissions. The plaintiff in their submissions have attempted to delve into the background and facts of the case no doubt in an effort to show they have a good case. It is however noteworthy that the alleged fraudulent acts referred to by the plaintiff are not against the Defendants but rather against former alleged officials of the plaintiff who sold the subject parcel of land to the Defendant. For all intent and purposes the Defendant could be said to have been bonafide purchasers for value without any notice of any defect in the title.

The plaintiff's suit was dismissed for want of prosecution and the plaintiff's in the instant application would need to explain the delay in the prosecution of the case. In the supporting affidavit the plaintiffs have attributed the delay to failure to obtain a timeous response from the Chief Land Registrar to an inquiry they had made on 13/1/2010. This letter to the Chief Land Registrar has not been exhibited and it is not clear whether there was any follow up with the Chief Land Registrar. The plaintiff states after they failed to get a response from the Chief Land Registrar they in December 2011 started inviting the Defendant to fix the suit for hearing. For a party who had come to court on a certificate of urgency and who had a pending interlocutory application, await of nearly 2 years to get a response to enable them to prosecute the suit was clearly inordinate delay.

The plaintiffs further attempt to explain the delay by stating that the court file was unavailable when they sought to fix the matter for hearing and in support of this they make reference to the letters inviting the Defendant's Advocates to fix a hearing date. This of itself cannot constitute evidence of the unavailability of the court file. As I observed earlier there was no endorsement by the court registry staff that the court file was unavailable something that they do routinely. As the invitation letters now stand it is not possible to confirm whether in fact any of the parties attended the court registry on the given dates for the purposes of taking a hearing date. There is no letter to the Deputy Registrar from either of the parties raising any issue of the file being unavailable and eliciting his intervention to have the same traced. In the premises therefore I do not accept there was any evidence of the court file missing in the court registry.

The plaintiffs further in their supporting affidavit state that on 4<sup>th</sup> February 2012 when their counsel was attempting to file an application for reconstruction he was advised by the Executive Officer that the suit was dismissed on 3<sup>rd</sup> February 2012 and that was in spite of the fact that vide their letter of invitation dated 31<sup>st</sup> January 2012 they had invited the Defendant's Advocates to fix the suit for hearing on 7<sup>th</sup> February 2012 which date was still 3 days away.

However what the plaintiff's have not explained is why after having learnt that their suit had been

dismissed only the previous day for want of prosecution why it took them another over 1 year 5 months to bring the instant application. The delay in filing the instant application after having learnt that the suit had been dismissed was in my view inordinate and inexcusable.

I have carefully considered the circumstances of this case and I am persuaded the plaintiffs have been extremely lax in the manner they have handled the prosecution of their suit. The court in my view was entitled to dismiss the suit on 3<sup>rd</sup> February 2012 having regard to the court record. As per the court record the last action taken in the suit was on 27/10/2009 when the matter was taken out and fresh hearing date ordered to be taken at the court registry. Thus the Notice to show cause why the suit should not be dismissed came up after 2 years and 3 months from the date of the last action in the matter. In my view no plausible reason has been given for such a delay and neither has any been given for the delay in bringing the present application and in those circumstances the plaintiff cannot be deserving of the exercise of the court's discretion in their favour. I decline to exercise my discretion in favour of the plaintiffs to reinstate the suit.

There is another matter that I wish to comment on. This court is a court of record and from my perusal of the court record it is clear and apparent that no summons to enter appearance have been issued and/or taken out for service on the Defendant. Under order 5 Rule 1 (5) the plaintiff has the obligation to prepare and have the same signed and collected for service under order 6 Rule 1 (6). To the extent that no summons have been issued and served upon the Defendant there has been no invitation on the Defendant to appear to defend the suit. This is yet another example of the plaintiff's laxity. Where a summons in a suit have not been served on the Defendant for over 4 years such suit would be liable to be struck out at the instance of the court and/or on application by the Defendant. As I have however come to the conclusion that the plaintiff's application seeking the reinstatement of the dismissed suit lacks any merit I will not take that route but rather decline to grant the plaintiff's application to reinstate the suit.

I accordingly order the plaintiff's application dated 26<sup>th</sup> July 2013 dismissed with costs to the Defendant.

**Ruling dated, signed and delivered at Nairobi this.....23<sup>rd</sup> .....day of.....May.....  
2014.**

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

..... for the Plaintiffs

.....for the Defendants